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SUPREME COURT U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 212.

WILLIAM W. BIERCE, LIMITED, A CORPORATION, APPELLANT,

vs.

CLINTON J. HUTCHINS, TRUSTEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

PETITION FOR REHEARING.

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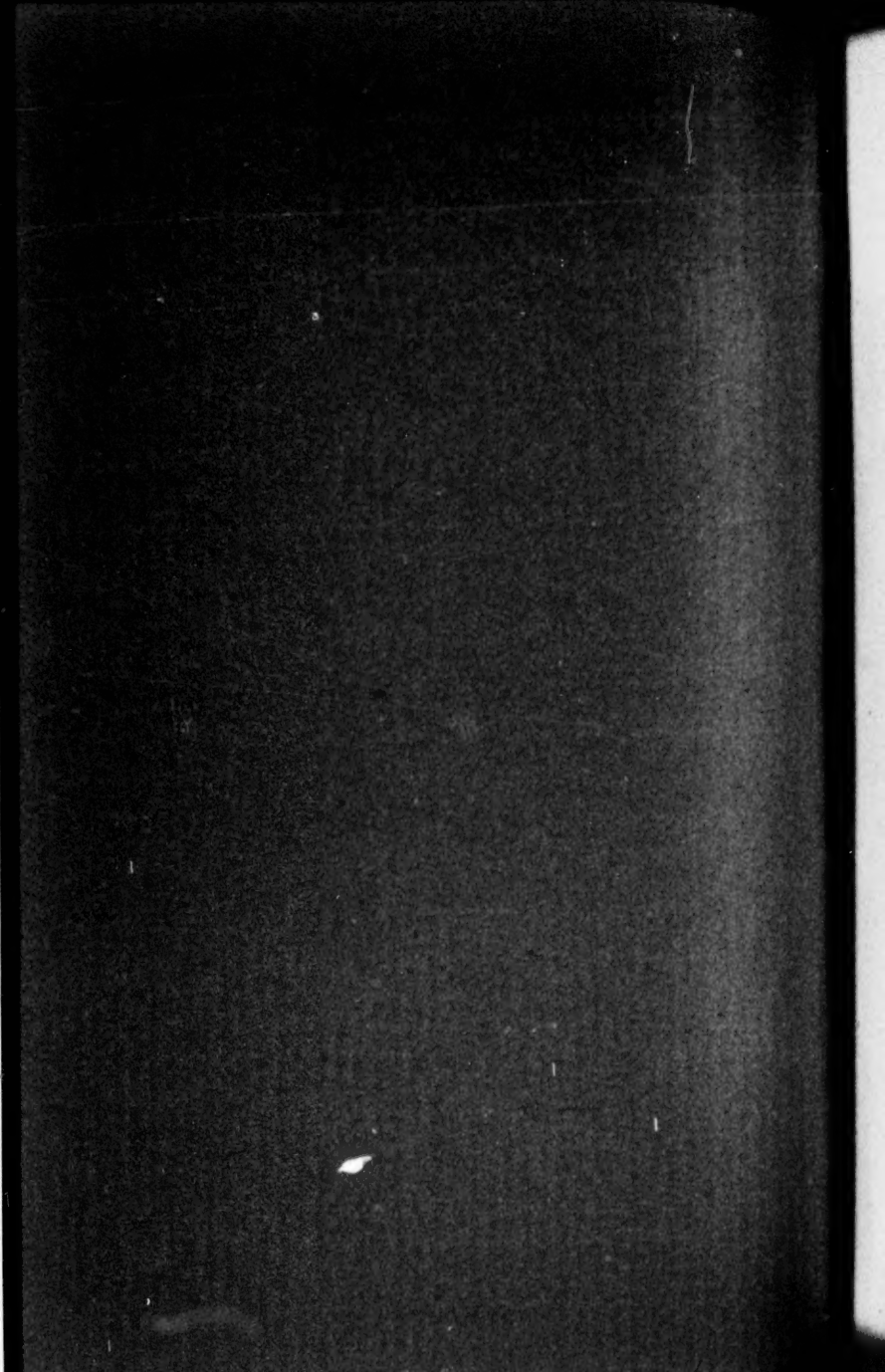

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Rehearing herein is respectfully prayed upon grounds not in the understanding of counsel covered by the present decision, to wit:

1. Neither the original contract of February 21, 1900 (R., 145-150), nor the "supplementary" contract of March 13, 1901 (R., 43), were recorded. The transaction was wholly between the appellant and the Kona Sugar Co.

2. The delivery made under the second contract was followed by the actual incorporation of the material—rails,

equipment, &c.—upon the Kona Company's Sugar plantation and hence made part thereof.

3. First-mortgage bonds of the Kona Company were required and taken by appellant as security, "said bonds being portion of a duly authorized issue not exceeding $200,000," and as expressly recited in the agreement of March 13, 1901 (R., 43).

4. Appellant's petition, filed on November 24, 1902, in the receivership proceedings, averred (R., 258):

a. That under the contract of February 21, 1900, appellant "furnished to" the Kona Company "certain goods, "merchandise, and materials, which by the terms of said "contract this intervenor was obliged to furnish to the said "Kona Sugar Co., Ltd."

b. And by paragraph V it was averred that the materials thus furnished would be used, and in fact were used, by the sugar company "in the construction and equipment of a certain railroad located on the plantation of the said Kona Sugar Company, Ltd.," etc.

c. By paragraph VIII (R., 260) it was averred that the Bierce Company "is the holder and owner" of $45,000 worth of the first-mortgage bonds of said Kona Sugar Company, *"which said bonds are secured by a mortgage upon all of the property of the said Sugar Company, Ltd., including that property herein below, in paragraphs XI and XII of this petition and intervention, more fully referred to and described."* The property thus referred to included *eo nomine* the railroad property and equipment here in suit.

Paragraph XIII then avers (R., 262):

> "That each and all of said property thus decreed by the said court to be sold as aforesaid, and advertised by the said F. L. Dortch, as receiver of the Kona Sugar Co., Ltd., to be sold in the manner and form above set forth, *is the same property which was conveyed by mortgage to secure to this intervenor,*

amongst others, the payment of the bonds hereinabove more specifically set forth as being now held by the intervenor herein."

And the prayer was that the order for sale of the Kona Company's property be modified by "saving and excepting "from said sale, and from the operation thereof, all liens, "rights, claims and interests of whatsoever name or nature "of all bondholders, and of all persons claiming, asserting, "or seeking to enforce any lien of whatsoever name or na- "ture, in, to, or against the aforesaid property or any part "thereof." * * * (R., 263.)

5. The appellant's petition of February 13, 1903 (R., 211-219), filed *after* dismissal of its lien suit, and praying recognition of its "Equitable replevin" to recover the same property, does not retract the statements made in its sworn petition of November, 1902, *supra*, declaring that this property was covered by the mortgage and bonds whereof it was part owner and holder.

We submit it must hence result:

I.

The appellant took inconsistent positions, to the manifest prejudice of its co-bondholders; and

II.

Its notice, given at the sale of the Kona Company's property in the receivership proceedings, that it *then* claimed and was seeking to replevin the same property which by its petition of November, 1902, it expressly admitted *was* covered by the mortgage given to secure the bonds, necessarily had the effect to lessen the selling value of the property, to the manifest resulting injury of the bondholders.

Assuming that appellant was not *required* to so plead that the property in suit was in fact covered by the mortgage securing the Kona Company's bonded indebtedness, it is plain that it *did* so voluntarily plead such facts as *true;* that by an order of sale theretofore entered, the property was offered at public auction on December 4, 1902, "subject to all liens "of every kind and nature upon said property at the date of "said receiver's appointment," and again on December 15, 1902, but without bidders therefor (R., 220, 221); whereupon, by order of April 20, 1903, the property was offered and sold "as one parcel, all of the property real, personal and "mixed, and rights, privileges, immunities, and franchises of "said company, *free and clear of all liens and incumbrances*" (R., 223, 225). In this offering and sale the bondholders had active interest, for by its terms their interests were included therein. When, then, at *that* sale preliminary notice was given by appellant that it claimed and would replevin the railroad and equipment of the plantation, which property was a vital part of the plantation and without which the property could not be run and would hence be practically valueless, the certain effect was to greatly depreciate and injure the selling value of the plantation, which was in fact and necessarily offered as a whole, including the railroad and equipment. Two efforts had been made to sell the property subject to all liens existing at the date of the receiver's appointment. Such form of sale would have left the bondholders' lien intact. But those efforts failed. Meantime appellant intervened in November, 1902, solemnly pleading that the bondholders' mortgage *did* cover this railroad property. Sale "free and clear of all liens and incumbrances" was hence compelled. When the sale was had, however, this appellant shifted its position, and by its notice of replevin thereat destroyed in large degree the selling value of the property. Small wonder that it was hence sold for less than the receivership obligations. The former experience made that result practically certain. Should the appel-

lant now be heard to say that its changed and inconsistent position injured no one?

In *Davis v. Wakelee*, 156 U. S., 680, 689, it was held:

> "It may be laid down as a general proposition, "that where a party assumes a certain position in a "legal proceeding, and succeeds in maintaining that "position, he may not thereafter, simply because his "interests have changed, assume a contrary position, "especially if it be to the prejudice of the party who "has acquiesced in the position formerly taken by "him."

And the decision continues (p. 690):

> "So in *Railroad Company v. McCarthy*, 96 U. S., "258, 267, it appeared that defendant proved on the "trial in the court below that it was impossible to "forward certain cattle on Sunday for want of cars, "and it was held to be fairly presumed that no other "reason was given for the refusal at that time, and "that the railway company could not, in this court, "set up the illegality of such a shipment on the "Sabbath, under the Sunday law of West Virginia. "In delivering the opinion of the court, Mr. Justice "Swayne says: 'Where a party gives a reason for "'his conduct and decision touching anything in-"'volved in a controversy, he cannot after the litiga-"'tion has begun, change his ground, and put his "'conduct upon another and different consideration. "'He is not permitted thus to mend his hold.' To "the same effect are *Railroad Co. v. National Bank*, "102 U. S., 14; *Daniels v. Tearney*, 102 U. S., 415, "421; *Everett v. Saltus*, 15 Wend., 474; *Holbrook "v. Wight*, 24 Wend., 169; *Winter v. Coit*, 7 N. Y., "288; *Mills v. Hoffman*, 92 N. Y., 181; *Wood v. "Seely*, 32 N. Y., 105; *Ellis v. White*, 61 Iowa, 243; "*Test v. Larsh*, 76 Indiana, 452."

So here we respectfully submit the appellant should not be permitted to shift its ground or to "mend his hold" when by its voluntary conduct, expressed in solemn pleading, it

had declared the lien of the mortgage did, in fact, cover this property, and then seek to defeat the lien it has thus chosen to so deliberately affirm, for the purchaser—the appellee here—stands in the shoes of the bondholders and is entitled to receive the same protection which by the appellant's conduct accrued to them.

Respectfully submitted,

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David L. Withington,
Attorneys for Appellee.

Counsel with deep respect, certify that the foregoing petition is not interposed for delay, and further certify their belief that the same is well founded in law.

Aldis B. Browne,
Alexander Britton,
Of Counsel for Appellee.